

The Administrative Law Judge found that claimant met with personal injury by accident arising out of and in the course of her employment on November 23, 2009, but suffered no permanent impairment. The ALJ failed to award past authorized medical expenses incurred, but did find claimant entitled to unauthorized medical expenses not to exceed \$500. Future medical treatment was denied by the ALJ.

The claimant filed an application for review arguing that she suffered a permanent injury and whole body permanent functional impairment as a result of her accidental injury. Claimant argues that based on the opinion of Dr. Stein she should be awarded a 5 percent functional impairment to the body as a whole and a 59 percent work disability. Claimant also argues that she is entitled to future medical treatment.

Respondent contends that the Award should be affirmed as claimant failed to prove that she suffered a permanent injury from the accident.

FINDINGS OF FACT

Claimant testified that, on November 3, 2009, she suffered injury to her knee, arm, neck and back while working for respondent after her leg got caught in a floor drain causing her to fall. Claimant reported the accident to her manager and was sent for medical treatment. Claimant was first examined and treated at the Siena Medical Clinic, for injury to her right forearm. Claimant met with Carmen Wilhelm, ARNP, the day after the accident, displaying tenderness and pain in her right arm, wrist and elbow from the fall at work. She had a four centimeter hematoma over the ulnar surfaces of the midshaft of the right forearm. Ms. Wilhelm diagnosed right ulnar contusion with hematoma.

Claimant was referred to Dr. Terry Hunsberger, an occupational medicine specialist on December 17, 2009. Dr. Hunsberger provided claimant with medication for the pain. The record does not contain the medical records from Dr. Hunsberger's treatment, but only comments regarding Dr. Hunsberger's findings that are contained in the reports of board certified neurological surgeon Paul S. Stein, M.D., and board certified orthopedic surgeon, John P. Estivo, D.O.

Claimant met with Dr. Hunsberger three more times, on January 6, 2010, January 20, 2010, and January 28, 2010 and then was released with no restrictions. On December 17, 2009, claimant was found by Dr. Hunsberger to have full range of motion of the neck, with the neck described as supple. At the January 20, 2010 examination, claimant had left shoulder and neck complaints and also complained of pain in her right knee. When examined by orthopedic surgeon C. Reiff Brown, M.D., on June 8, 2010, claimant's complaints included left shoulder, neck, right knee and thoracic spine. However, Dr. Brown did not testify in this matter.

Even though claimant was returned to work without restrictions, she was fired on July 17, 2011, for refusing to lift a pot to make bread that she determined was too heavy for her and that she alleged she was unable to lift. Claimant does not speak English and has not looked for a job since she was fired. She has been a resident of the United States for 10 years. Claimant worked for respondent for two years and eleven months performing her regular duties, including 20 months after the accident.

Claimant has not worked since July 17, 2011, alleging an increase in her pain. She applied for unemployment benefits, but was denied because she didn't agree to look for work because she didn't feel well enough to do so.

Claimant testified that she does do some housework. She denies any prior injuries. She continues to have pain in her knee, arm, neck and back and she has also complained of pain in her lower abdomen area on the left side.

Claimant met with Dr. Estivo at respondent's request, on April 20, 2012, in relation to her incident at work. At the time of this examination claimant was 44 years old. She complained of pain along the left side of her neck, thoracic and lumbar spine, and lower abdomen. She denied any prior injuries in those areas.

Dr. Estivo examined claimant and opined that she had a resolved right forearm contusion, multiple subjective complaints without objective abnormalities and symptom magnification. He went on to state:

. . . I cannot find any objective abnormalities to explain the various multiple subjective complaints that she has today. She does exaggerate her reactions. There are inconsistencies on examination. I do suspect symptom magnification. I do also suspect secondary gain. Based on the fact that I cannot find any objective abnormalities with this patient to explain her multitude of subjective complaints, it is my opinion this patient has not experienced any impairment in relation to the injury claim of 11/23/2009. She does not require any further medical treatment in relation to that injury claim. She does not require any restrictions in relation to that injury claim.¹

Dr. Estivo noted that claimant had no complaints in her neck or back when she met with Dr. Hunsberger on December 17, 2009. She did have complaints of pain in her left shoulder, which was localized to a lipoma to the posterior left shoulder. Dr. Estivo noted that the first mention in Dr. Hunsberger's records of neck pain was on January 6, 2010. Claimant's right knee complaints were first mentioned on January 20, 2010. Her low back complaints were first noted in June when she was examined by Dr. Brown and again in October or November 2010 when claimant met with Dr. Stein. In Dr. Estivo's opinion, claimant's low back complaints and neck complaints are not related to the November 29, 2009 accident.²

Claimant met with Dr. Stein for a court ordered IME, on October 28, 2010. Dr. Stein noted claimant had complaints of pain in the right wrist, and forearm along the ulnar side of the forearm, the right knee, left neck, trapezius, left shoulder blade, and down into the

¹ Estivo Depo., Ex. 2 at 5 (Dr. Estivo's Apr. 20, 2012 IME Report).

² Estivo Depo. at 5-6.

left lower back. Claimant reported that at work she has pain in all of these areas, but the worst is from the left side of the neck to the left lower back. Claimant denied a prior history of neck, shoulder, back or knee symptomatology. Claimant could not put a number to the pain in her neck, shoulder and back, but the pain in her right knee she rated at a 7 to 8 out of 10.

Dr. Stein examined the claimant and opined that she sustained some soft tissue injury in the work incident on November 23, 2009. However, at the time of the exam he found no evidence of a structural injury to the spine or joints of the upper extremities. He also found nothing definitive to suggest intraarticular injury to the right knee.

Dr. Stein opined that if the first time claimant complained of neck pain was in January 2010, then he would have a hard time relating that to the November 23, 2009 fall. He had the same opinion regarding claimant's knee pain.³

Dr. Stein found claimant to be at maximum medical improvement and rated claimant with a 5 percent impairment to the body as a whole under DRE cervicothoracic category II for a mild impairment to the neck, left trapezius and upper back. He recommended claimant try to avoid lifting more than 40 pounds. He opined that if claimant had to lift more than 40 pounds it would cause claimant any injury.

Dr. Stein reviewed the task list provided and opined that claimant out of 11 tasks could no longer perform 2 for an 18 percent task loss.

Claimant met with Robert Barnett, Ph.D., for a vocational assessment on January 6, 2012. Claimant had three jobs within the 15 years before her accident, with some periods of unemployment. Dr. Barnett identified 11 tasks from those jobs.

Dr. Barnett opined that since claimant was not working she had a 100 percent wage loss and based on the restrictions of Dr. Stein, he felt claimant has a 45 percent task loss, having lost the ability to perform 5 out of 11 tasks. Combined with the wage loss, Dr. Barnett felt claimant has a 73 percent work disability.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.⁴

³ Stein Depo. at 15-16.

⁴ K.S.A. 44-501 and K.S.A. 44-508(g).

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.⁵

Claimant alleged at the regular hearing, a myriad of maladies from the fall on November 23, 2009. However, the records from the initial examination at Siena only contains complaints to the right upper extremity. During the subsequent examinations by the various health care providers, claimant added complaints to her neck, right knee, low back and thoracic spine. It is apparent that Dr. Estivo found claimant's complaints questionable. He described her as being inconsistent on examination, exaggerating her reactions, a symptom magnifier, suspect as to secondary gain and displaying only subjective complaints with no objective abnormalities noted. He then opined that claimant suffered no permanent impairment as the result of the fall on November 23, 2009.

Dr. Stein found claimant to have a 5 percent functional impairment for her neck complaints, but was troubled by the apparent delay in claimant's report of neck symptoms in this record.

The ALJ determined claimant had no permanent impairment from the accident on November 23, 2009, finding that claimant had failed to meet her burden of proof. The Board agrees with the findings and determinations of the ALJ. Claimant has failed to prove that her multiple complaints were causally related to the November fall. The only complaints reported to Siena, the day after the fall were to the right upper extremity at the level of the arm. The remaining complaints arose over the many months after the fall. The ALJ did not directly address claimant's credibility in this Award. However, it is evident that claimant's testimony did not persuade the ALJ. Even Dr. Stein, who provided claimant with an impairment to her neck, was unable to connect complaints which arose weeks after the fall with the fall itself. The denial of a permanent award in this matter is affirmed.

However, the Board notes that the ALJ failed to award payment for the costs of the lengthy medical treatment claimant received for her injuries. Respondent has not denied the fact of the fall occurred. But, denies the permanency alleged to have stemmed from that accident. Therefore, claimant is entitled under the Act to the authorized medical treatment provided by respondent. The Award will be modified accordingly.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be modified to award claimant the authorized medical treatment provided by respondent for the above accident, but affirmed in all other regards. Claimant

⁵ *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

has failed to prove that she suffered any permanent impairment as the result of the fall on November 23, 2009.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Pamela J. Fuller dated June 13, 2012, is modified to award claimant the authorized medical treatment provided in this matter but affirmed in all other regards.

IT IS SO ORDERED.

Dated this _____ day of October, 2012.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

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